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## The Future of Environmental Governance

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## The Future of Environmental Governance

For authors dealing with Brexit, the phrase “at the time of writing” has become an essential component of any paper that leaves us on its journey towards publication. This paper, setting out thoughts on the future structure of environmental governance across the UK, must inevitably, therefore, start by noting that what can be said at the time of writing (early May 2019) will have been overtaken by events by the time this comes to be read. Nevertheless, it seems impossible that all (and indeed unlikely that any) of the elements of the new structures will be firmly in place by the time this reaches publication, so that we are likely still to be discussing the design, rather than the evaluation, of the new governance structures which will apply to environmental law.

From the earliest commentaries on the impact of Brexit for environmental law, one of the key issues identified has been the loss of the external oversight provided by EU institutions.<sup>1</sup> Before the 2016 Referendum, the Environmental Audit Committee noted that: “The UK’s membership of the EU has ensured environmental action was taken on a faster timetable and more thoroughly than would otherwise have been the case.”<sup>2</sup> A key element in this has been the powers of the European Commission and Court to ensure that all Member States are living up to their legal commitments. The fact that there is an effective (albeit imperfect and slow) means of calling the government to account, with the potential for real sanctions as a last resort, has meant that environmental obligations have continued to be taken seriously, even when they become costly to implement, difficult to achieve or conflict with other priorities. This external reinforcement is especially important since the long-term and multi-faceted nature of what is needed to achieve environmental goals, such as cleaner air and rivers, leaves such commitments particularly vulnerable to the more immediate demands of short-term politics. An illustration of this is the mismatch between the rhetoric on the value of environmental taxation in changing behaviour and the reluctance to adopt increases in fuel duties and other taxes that will have an effect on voters’ pockets.

In view of the strong deregulatory language that was prevalent in the early days, one of the (very few) pleasant surprises of the Brexit process has been the widespread acceptance that environmental regulation must be taken seriously and that something must be put in place to fill the gap left by the loss of the EU oversight arrangements. Since environmental matters are largely devolved, each nation has been developing its own plans:

- The UK Government, for England and for matters handled at UK level, produced at the end of 2018 the Draft Environment (Principles and Governance) Bill. This was required by section 16 of the European Union (Withdrawal) Act 2018 and followed a consultation paper earlier that year.<sup>3</sup> The Bill sets out clear proposals for the role of principles and the creation of an Office for Environmental Protection (OEP).
- In Scotland, provisions requiring proposals on environmental principles and governance were included in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.<sup>4</sup> The Bill has not proceeded to Royal Assent following the UK Government’s partially successful

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<sup>1</sup> C T Reid, “BREXIT and the Future of UK Environmental Law” (2016) 34 JENRL 407.

<sup>2</sup> House of Commons Environmental Audit Committee *EU and UK Environmental Policy* Third Report of Session 2015–16 HC 537 pp.3 & 8.

<sup>3</sup> DEFRA, *Environmental Principles and Governance after the United Kingdom leaves the European Union* (2018)

<sup>4</sup> Section 26A of the Bill as passed.

challenge in the Supreme Court,<sup>5</sup> but the Scottish Government published in February 2019 its *Consultation on Environmental Principles and Governance*. This builds on a report produced in May 2018 by a sub-group of the Roundtable on Environment and Climate Change<sup>6</sup> and is open-ended on several key points as opposed to presenting a well-defined proposal such as in the Draft Bill for Westminster.

- In Wales, the Law Derived from the European Union (Wales) Act 2018 (parallel to the Scottish Continuity Bill and now repealed) did not contain any specifically environmental provisions but a consultation document *Environmental Principles and Governance in Wales Post European Union Exit* was published in March 2019. This again is open-ended on several key points, noting the need to fit any proposals within the distinct framework for environmental governance already created by the Well-Being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.
- In the absence of a functioning government in Northern Ireland, there is less scope for progress, but a letter from the Permanent Secretary at the Department for Agriculture, Environment and Rural Affairs has indicated a willingness to work on extending the provisions of the Draft Bill, including the role of the OEP, to Northern Ireland.<sup>7</sup>

### Overall approach

The different documents reflect different approaches to the same challenge and one notable feature is that whereas the Scottish and Welsh papers leave room for discussing different options, the Draft Bill presents a fully-formed proposal.<sup>8</sup> The different nations are therefore moving forward at different paces. The inter-connected nature of the physical and policy environment across the UK suggests that there would be benefits in collaboration, and the potential for co-designing new arrangements is expressly recognised in the various papers. It seems very unlikely, however, that any such co-ordination will be achieved, purely from the perspective of the timescales for policy development, regardless of any political considerations. The amount of work still to be done to develop the Scottish and Welsh proposals from the current range of options to a fully-worked proposal for legislation suggests that the more advanced Westminster scheme might be in place well before the others. The time needed for legislation also suggests (subject to any substantial transitional arrangements on leaving the EU) that, even for England,<sup>9</sup> there may need to be interim arrangements to cover the gap between the EU authorities losing their role and the new domestic systems being fully operational.

In terms of content, the different proposals also vary in their connection with wider governmental policy and structures. The Draft Bill contains a more self-contained proposal for the new OEP than the approaches in Scotland and Wales, where there is more explicit reference to how environmental

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<sup>5</sup> Some of the UK Government's arguments that the Bill was outwith the legal competence of the Scottish Parliament were successful; *Re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64. The successful arguments were largely based on provisions in the European Union (Withdrawal) Act 2018, provisions added at a late stage of that Act's passage at Westminster, after the Scottish Bill had completed its parliamentary stages at Holyrood.

<sup>6</sup> *Environmental Governance in Scotland on the UK's withdrawal from the EU - Assessment and options for consideration: A report by the Roundtable on Environment and Climate Change* (2018).

<sup>7</sup> <https://www.parliament.uk/documents/commons-committees/environmental-audit/correspondence/190227-Dr-Denis-McMahon-to-Chair-environment-bill.pdf>

<sup>8</sup> Indeed the earlier consultation paper (note 3), already contained the key elements of the proposed scheme, as opposed to canvassing options.

<sup>9</sup> "How Gove aims to plug the green oversight gap" (2019) 530 ENDS Report 8.

considerations and structures fit into the wider context, including the potential of adapting existing oversight mechanisms to fill the scrutiny gap, rather than creating a new body. In Wales that embracing of the wider context is inevitable in view of the recently established framework for environmental governance there. The steps already taken there to embed environmental concerns at the heart of government, and the creation of a supporting structure including the Future Generations Commissioner for Wales,<sup>10</sup> mean that the starting point in Wales is very different from that in England and Scotland.

In Scotland the integration with wider concerns is shown by explicit links to the National Performance Framework and other national policies, and the intriguing hint of the possibility of recognising a right to a healthy ecosystem within a new Human Rights Framework for Scotland. In contrast, the OEP can seem rather isolated and a product of the one department rather than the whole government. Significantly, though, a major feature in the proposals in the Draft Bill is the role of the OEP (not replicated in the other jurisdictions) in monitoring and reporting on the statutory environmental improvement plans also provided for in the Draft Bill; the 25 Year Environment Plan published in January 2018 will be recognised as the first of these.<sup>11</sup> How the new arrangements in each nation are to fit into and work with other parts of government is obviously a key issue for the future, with the earning of credibility, trust and respect as important as the formal structural arrangements for ensuring oversight and compliance with the environmental measures that will become “retained EU law”.<sup>12</sup>

## Principles

One element of the various proposals is discussion of the status of environmental principles, with all wishing to establish some legal recognition for principles, as is achieved at present through EU law. There is a shared core of four key principles drawn from EU law - prevention, precaution, rectification at source and polluter pays – but how these are supplemented and used varies across the different proposals. In Wales, prevention and precaution are said to be already legally recognised through the principles embedded in the commitment to sustainability which provides an overarching context for policy under the Well-Being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016. Accordingly, new arrangements need provide only for the explicit recognition of polluter pays and rectification at source. In Scotland, just the four principles are considered, whereas in the Draft Bill, a longer list of is adopted, including integration, sustainable development and elements drawn from the Aarhus Convention (which arguably should be treated as rights, not principles).<sup>13</sup>

Although in Wales the existing legal recognition of relevant principles across government will ensure their wider application, in the Draft Bill and for Scotland the proposal is to introduce only a duty on Ministers (not all public authorities) to have regard (not anything stronger) to the principles in the formation of policy and legislation (not in all decision-making). This places the obligation very much at the weaker end of the spectrum in terms of force and application, ensuring that the environment will always be a relevant consideration in high-level policy making but not guaranteeing that it will be given much weight.<sup>14</sup> Given the long list of other duties already imposed on public authorities in relation to

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<sup>10</sup> See <http://futuregenerations.wales/about-us/future-generations-commissioner/>

<sup>11</sup> HM Government, *A Green Future: Our 25 Year Plan to Improve the Environment* (2018).

<sup>12</sup> The term used by the European Union (Withdrawal) Act 2018 for the provisions in EU law which will continue in force, but as domestic law, when Brexit takes effect.

<sup>13</sup> DEFRA, *Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response* (2018), 8-9.

<sup>14</sup> C.T. Reid, *Nature Conservation Law* (3<sup>rd</sup> edn) (W Green, 2009) 58-64.

climate change, biodiversity and the countryside, there may be a wider argument for reviewing and rationalising, rather than simply adding to, that list, especially since the more duties that are imposed the less meaningful each can be. Nevertheless, these proposals do not create a strong driver towards environmental enhancement.<sup>15</sup> One way forward might be to add a commitment to ensuring a high level of environmental protection.<sup>16</sup> This may be unnecessary in Wales in view of existing legal commitments, but for the rest of the UK might provide a clear objective to guide policy and aid in resolving any of the difficulties that might arise in the more detailed consideration of principles.

## Oversight

All the documents identify the need for new arrangements to fill the gap left by the loss of the oversight provided by EU institutions and set out criteria for what is required. Independence from government is the shared fundamental, supported in various combinations by access to specialist expertise and skills, adequate powers (including credible final sanctions), adequate and guaranteed resources, and a clear and durable statutory basis. There are different ways of satisfying all of these, but while the Scottish and Welsh papers canvass a range of options, including developing existing audit arrangements or using current or new Commissioners, clearly linked to the legislature, the Draft Bill proposes a new Office for Environmental Protection. An immediate target of criticism here has been that the plan to establish this as a non-governmental public body, with its chair appointed and finances provided by the Secretary of State, is seen as providing inadequate freedom from governmental influence.

Nothing that can be done within the domestic political and legal system can replace the external element provided by the EU, nor the informal pressure towards compliance created by the knowledge that ignoring concerns expressed by the Commission might eventually lead to meaningful enforcement action. In the domestic context, it is the credibility and respect that those exercising the scrutiny and enforcement functions earn that are as likely to be significant as their formal powers. It is the acceptance of their role and not their limited formal powers that gives the Ombudsman systems their weight in calling government to account. The structural formalities are not unimportant and guarantees for independence in the appointment, expertise, operation and funding of the scrutiny bodies must be provided, but the onus will be on all concerned to show that from the beginning the new arrangements are a serious element in the accountability of government.

The inevitable focus on the design of the scrutiny and enforcement structures should not deflect from the necessary pre-requisite of effective oversight which is information. Monitoring and reporting requirements are a common feature of EU environmental laws and it is important that these are maintained. Moreover, they should continue in a way that assists scrutiny, so that comparisons can be made across time and across space, matching what is being done elsewhere so that trends and comparative performance can be properly identified and best practice applied. The Scottish paper calls for a review of monitoring and reporting requirements with a view to clarification, rationalisation and consolidation, and this would be welcomed more broadly to avoid the risks of duplication of effort and fragmentation that might diminish the effectiveness of reporting.

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<sup>15</sup> See, for example the criticism of the biodiversity duties in Public Audit and Post-legislative Scrutiny Committee, *Post-legislative Scrutiny: Biodiversity and Biodiversity Reporting Duties* (2<sup>nd</sup> Report of 2018, SP Paper 369) and House of Lords Select Committee on the Natural Environment and Rural Communities Act 2006, *The countryside at a crossroads: Is the Natural Environment and Rural Communities Act 2006 still fit for purpose?* (HL 2017-19 99), chap.4.

<sup>16</sup> As embodied in art 191 of the Treaty of the Functioning of the European Union.

Just as monitoring and reporting can identify where problems are arising, so can complaints from members of the public. The ability to lodge complaints not only provides a means for specific complaints to be followed up (without the expense and stress falling on individuals) but is also a means of informing the oversight body of areas of concern that may merit further examination. The various proposals contemplate some continuation under the new arrangements of the existing opportunity to make complaints, replacing the current recourse to the European Commission. There should, however, be no obligation to follow up every complaint. That would place too great a strain on the new structure's resources and risk it becoming bogged down in many potentially repetitive individual cases rather than being able to concentrate on more significant issues. The fact that complaints are visibly taken seriously, though, will be an important element in building public confidence in and respect for the new arrangements and this relationship is one that will have to be handled carefully.

A further comment on oversight relates to its scope. Exactly what falls within "environmental" law and policy has notoriously unclear boundaries, but the Draft Bill for Westminster and its accompanying documents have suggested fairly narrow limits. These exclude issues, such as the allocation of resources within government, which have an obvious impact on environmental performance and also suggest a clear separation between environmental matters and climate change. With existing mechanisms for reviewing and reporting on climate issues, notably the statutory role of the Climate Change Committee, there is an understandable desire to avoid duplication. The better approach, though, is surely to be inclusive in setting the scope of the scrutiny arrangements and to allow the bodies responsible to focus their attention within that, rather than to find themselves prevented from examining significant issues because of awkward and perhaps unintended limitations in the definition of their scope. Memoranda of understanding can clarify responsibilities where different bodies might potentially overlap.

#### International context

A further consideration that must be borne in mind in reflecting on the effort going in to designing new governance arrangements is that the freedom of action may be constrained by international agreements. Such agreements, whether on the future relations between the UK and EU or more narrow trade agreements with any partner, often contain environmental provisions that will affect what happens within the UK. The "Backstop" in the Withdrawal Agreement reached between the UK Government and the EU<sup>17</sup> contains substantial and detailed obligations which significantly affect the application of environmental principles and the shape and operation of any new structures. Although the precise terms of the Backstop may never come into force, the potential for similar obligations to apply in future must be borne in mind, potentially cutting across the different visions being developed in any of the individual nations. How far the new structures should match (or can easily be adapted to match) the Backstop or similar obligations is a question loaded with political sensitivities. The fact that international agreements are exclusively a matter for the UK Government, with (so far) limited involvement for the devolved administrations, adds a further tension to the cross-UK dimension of finding the way ahead.

The Backstop contains an obligation to "ensure that the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards

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<sup>17</sup> Part 2 of Annex 4 of the Protocol on Ireland/Northern Ireland to the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (November 2018).

applicable within the Union and the United Kingdom” across a wide range of specified areas of environmental law.<sup>18</sup> In effect this builds in a commitment to the non-regression principle. The terms also require the existence of “an independent and adequately resourced body or bodies” to ensure “effective domestic monitoring, reporting, oversight and enforcement” of environmental obligations. The body must have power to act on complaints or at its own initiative and to have recourse to litigation within a system that provides “sanctions [that] are effective, proportionate and dissuasive and have a real and deterrent effect,” including interim measures.<sup>19</sup> Meeting these requirements does still leave room for national variation, but means that there is not a free hand in designing new structures. It will not go down well if international agreements made by London mean that the carefully constructed governance structures being put in place elsewhere have to be redesigned to meet fixed commitments that the devolved administrations had little say in accepting.

## The Next Steps

The next few months, including those between the drafting of this paper and its being read, will be an important time for the future of environmental governance across the UK. It seems inevitable that each nation will continue to develop in its own way and at its own pace. This has the benefit of enabling each system of governance to operate against its own background, fitting in with the relevant policy, scrutiny and enforcement structures. But given the physical, economic and social connections across the UK, operating wholly in isolation is not desirable. Without treading on delicate political ground, two simple steps can be recommended for all the nations as we look to the immediate future.

The first is to ensure that the new arrangements do not place obstacles in the way of collaboration. As a key example, there should be provisions that expressly enable the sharing and co-production of data between bodies exercising similar functions in other parts of the UK and beyond. It would be too easy for the focus on shaping the provisions for each national context to lead to unintentional barriers to co-operation being created, and this must be avoided.

The second is that the different administrations should agree to review the position in a few years’ time to see if there is scope for improvement to achieve a more effective and more integrated system of scrutiny. In facing novel challenges there are benefits in allowing a hundred (well, four) flowers to blossom, but each nation can learn from the others and there may be ways in which collaboration can be enhanced and streamlined. With so much political turmoil at present and the pressure simply to fill the gaps created by Brexit, we will not get everything right just now. There would be some comfort in recognising this and looking forward to further reflection in what we hope will be calmer times, when we can see what we have done well and where things can be improved. Current conditions, in so many ways, are not ideal for the major task of designing the long-term future of environmental governance across the UK. Let us work hard to do the best we can, but accept that the outcome will be better if we commit to having a second look once things are up and running and we can see where the strains and frictions arise.

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<sup>18</sup> Ibid., art.2.

<sup>19</sup> Ibid., art.3.